No. 83-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MENOMINEE TRIBE OF INDIANS, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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THE QUESTIONS PRESENTED

1. Whether the six-year statute of limitations for an Indian tribe to file suit against the United States for mismanagement of a tribal forest was tolled during a period of years where:

(a) the forest was held in trust by the United States in a strict fiduciary capacity;

(b) government agents exercised complete control of the forest's management (as Congress ordered by the Act of March 28, 1908), for over 75 years.

(c) the Indians lacked technical forestry expertise and were totally dependent on government agents for management of the forest; and

(d) the facts of mismanagement (suppression of new growth and excess timber mortality because of failure to cut enough timber) were unknown to the Indians and could not have been discovered by them, without the advice of outside forestry experts.

2. Whether a claim based upon the failure of government officials to discharge their statutory fiduciary responsibilities to an Indian tribe is completely beyond the jurisdiction of the courts where a) the actions complained of were taken by those officials in the course of implementing a statute calling for termination of the trust but during the period when the trust was still in effect and b) Congress' instruction to provide the Indians with "reasonable assistance" during the windup of the trust was specifically violated.

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Petitioners, the Menominee Tribe of Indians, et al., respectfully pray that a writ of certiorari issue to review the judgments, orders and opinions of the U.S. Court of Appeals for the Federal Circuit in *Menominee Tribe, et al. v. United States*, Docket No. 134-67A, hereinafter called "Deed Restrictions" and *Menominee Tribe, et al. v. United States*, Docket No. 134-67B, hereinafter called "Forest Mismanagement."

OPINIONS BELOW

Review is hereby sought of the decisions of the U.S. Court of Appeals for the Federal Circuit reported at 726 F.2d 712 and 726 F.2d 718. The court's opinion of December 30, 1983 (*Deed Restrictions*) is reproduced as Appendix A to this Petition and its opinion of January 24, 1984 (*Forest Mismanagement*) is reproduced as Appendix B to this Petition.[1]

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[1] The Trial Judge's unpublished Findings and Opinions of January 2, 1981 (*Deed Restrictions*, hereinafter cited as "T.J. 134-67A") and April 4, 1980 (*Forest Mismanagement*, hereinafter cited

JURISDICTION

Judgments of the Court of Appeals were entered on December 30, 1983 in *Deed Restrictions* and on January 24, 1984 in *Forest Mismanagement* (rehearing denied February 16, 1984). A motion for extension of time to May 28, 1984 within which to file this petition was granted March 16, 1984, by the Chief Justice (App. C) and this Petition was filed within the extended period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Menominee Termination Act, 25 U.S.C. §§ 891-902, reprinted as Appendix D.

The Menominee Restoration Act, 25 U.S.C. §§ 903-903f, reprinted as Appendix E.

The Act of March 28, 1908, 35 Stat. 51, 3 Kapp. 317, reprinted as Appendix F.

STATEMENT OF THE CASE

This case has its genesis in the now-discredited "termination" policy of the 1950's when Congress declared a general policy to end the special status of Indians, ostensibly to "grant them all of the rights and prerogatives pertaining to American citizenship."[2] While ad-

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as "T.J. 134-67B"), were the subject of a motion to waive requirement of printing, filed April 17, 1984, denied by the Court on May 21, 1984, with notice reaching counsel on May 23, 1984, so that it was impossible to have these voluminous materials printed prior to the time for filing this Petition. As suggested to counsel by the Clerk of the Court, these materials will be printed and filed with the Court as soon as possible. They will be contained in supplemental Appendices G and H respectively, with the original pagination noted in brackets. Page references to the Trial Judge's Findings and Opinions in this Petition are to the bracketed page numbers in Appendices G and H.

[2] H.R. Con. Res. 108 (Senate concurring), 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

vocates of termination justified it as an "emancipation" of Indians from injurious federal control, it has long been clear in hindsight that the inevitable effect of "termination", where it was tried, was to erode Indian rights and gravely worsen conditions on terminated reservations.[3]

In 1954, Congress decided that the Menominees were ready for termination of federal tutelage and protection, and passed the Menominee Termination Act.[4] Under the terms of that Act, the Menominees were required to formulate a plan for the termination of their federal rights and status—a procedure that gave them at least the possibility of retaining some semblance of their tribal existence.[5] The Menominees were strongly opposed to termination but lacked the political power to prevent passage of the Termination Act. They did fight a delaying action,[6] but, in the end, were forced to bow to

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[3] As stated in President Nixon's historic message to Congress of July 8, 1970 (Special Message to the Congress on Indian Affairs, (1970), Pub. Papers 564 (Richard M. Nixon), the rights of Indian tribes did not result from acts of legislative grace but had been bargained and paid for by the Indians. The President noted that the Indians "surrendered claims to vast tracts of land and have accepted life on government reservations" and that "the special relationship between the Indian tribes and the federal government which arises from these agreements continues to carry immense moral and legal force." He concluded that "[t]o terminate this relationship would be no more appropriate than to terminate the citizensihp rights of any other American" and that the "termination" policy should be abandoned because "the practical results have been clearly harmful in the few instances in which termination actually has been tried."

[4] 68 Stat. 251 (1954), as amended, 25 U.S.C. §§ 891-902 (1963) (App. D).

[5] *See* discussion in *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

[6] The Act was amended on four separate occasions, ultimately extending the date when termination was to become effective from December 31, 1958 to April 30, 1961. (T.J. 134-67A, Fdg. 27, pp. 121-22).

the will of Congress, to prepare and submit a termination plan by a date certain.[7]

The Menominees' desperate fear of termination proved well founded.[8] Before long, it was recognized that the forced termination of the Menominees coupled with the failure to give them adequate preparation for the change, had been a tragic mistake (T.J. 134-67A, Fdgs. 90-94, pp. 155-58). Social and economic conditions of the Menominee community became so hopeless that less than 12 years after the Termination Act was implemented on the Reservation, Congress passed the Menominee Restoration Act, reversing "termination." 87 Stat. 770 (1973); 25 U.S.C. § 903 (1976) (App. E).

In restoring the Menominees to federal status, the Congress itself, throughout the legislative history of the Restoration Act, documented, as the Trial Judge did below (*see* T.J. 134-67A, Fdgs. 95-105, pp. 158-67), the tragic results of the Menominee Termination Act.[9]

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[7] An amendment to the Termination Act required that the Secretary of the Interior turn all their trust property over to a private trustee if they failed to submit the required plan. They feared that this alternative would inevitably have led to complete obliteration of their tribal existence. T.J. 134-67A, Fdgs. 79-82, pp. 151-52; Fdg. 100, p. 161; T.J. Op. pp. 17-18.

[8] Long regarded as one of the most socially and economically advanced American Indian tribes, the Menominees who, as the Trial Judge concluded, were in no way prepared to manage their own affairs at the time of termination, were swiftly plunged into an abyss of poverty and severe social disorder. (T.J. 134-67A, Op. pp. 31-35). Menominee County, which was created by the State of Wisconsin contemporaneously with the implementation of the Termination Act and which was co-extensive in area with the boundaries of the old Menominee Reservation, became the poorest county in the State.

[9] Congressman Haley described the Termination Act as "one of the unfortunate moves that the Congress made." 119 Cong. Rec. 34301-02 (1973). Congressman Saylor, speaking in favor of the Restoration Act and referring to the "mistaken" termination policy noted that the Restoration Act would not "*undo the human suffering and economic damage imposed on these people over the*

Prior to the passage of the Restoration Act in 1973, the Menominees, believing that the Termination Act had severely damaged them, brought suit in the Court of Claims to recover damages for their losses.[10] Trial Judge Louis Spector found that these damages, in the instant cases, amounted to $36,495,915. (*See* T.J. 134-67A, p. 111; T.J. 134-67B, p. 54).

The Specific Menominee Termination Claims

A. Background

The Menominee Tribe settled on their heavily forested reservation in Wisconsin pursuant to the 1854 Treaty of Wolf River.[11] In 1908, Congress directed the Bureau of Indian Affairs to assume complete control over the Menominee forest and to operate it on a "sustained-yield" basis as a commercial venture, in conjunction with a sawmill, for the benefit of the Menominee Indians.[12]

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past 20 years." 119 Cong. Rec. 34302 (1973) (emphasis added). *See also* S. Rep. No. 581 (Menominee Restoration Act), 93rd Cong., 1st Sess. 3-4 (1973).

[10] Under controlling legal precedents, the Menominees were advised that they could not obtain redress for the immense social injury they had suffered as a result of termination. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1200 (Ct. Cl. 1970); *Seminole Nation v. United States*, 498 F.2d 1368, 1375-76 (Ct. Cl. 1974). Therefore, their claims were narrowly focused on the economic damage done to their property by the Government during the termination process.

We will never know how they would have fared under termination had the Secretary of the Interior properly carried out his trust obligations to the Menominees during the period of tribal preparation for termination. As determined by the Trial Judge, much of the economic damage suffered by the Tribe after termination is entirely traceable to the premature withdrawal of federal supervision and protection, and to misconduct of officers of the Department of the Interior, during the termination process, in violation of their continuing fiduciary duties. *See* detailed discussion, *infra* at 8-9, 12-13.

[11] *See Menominee Tribe v. United States, supra*, 391 U.S. at 405-06 for a full discussion of the meaning of that Treaty.

[12] Act of March 28, 1908, 35 tSat. 51 (App. F).

Although a number of Menominees were employed in the forest and the Menominee mill, all jobs at the managerial level during the period of the Bureau of Indian Affairs' trusteeship (which terminated in 1961) were held by government agents. During this period the tribal members were totally dependent upon the officials and agents of the Bureau of Indian Affairs and were not trained to take over the management of their forest assets (*see* T.J. 134-67B, Op. p. 6).

B. The Deed Restriction Claim

1) *The facts*

Under the provisions of the Termination Act, as amended, the Menominee forest after termination was to be managed on a "sustained-yield" basis (*see*, Act of July 14, 1956, 70 Stat. 549, 25 U.S.C. § 89). This was not a departure from the past since commercial operations in the Menominee forest, under the 1908 Act, had always been subject to a "sustained-yield" requirement, *i.e.*, following the guiding principle that amount of timber harvest should not exceed the annual growth of the forest.[13] But the benefit of the "sustained-yield" requirement mandated by Congress was turned into something far different and pernicious through concerted actions of the Department of the Interior and the State of Wisconsin.

In order to survive as a tribe and maintain their identity, the Menominees intensely wanted to have their own separate county after termination. They also needed to obtain some relief from the State of Wisconsin with respect to taxes on the cutting and sale of their timber, which their new, emancipated status subjected them to for the first time (T.J. 134-67A, Fdg. 52, p. 134).

Wisconsin officials, who had originally proposed to turn the Menominee Reservation into a *public* park and de-

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[13] *See Menominee Tribe v. United States*, 117 Ct. Cl. 442, 463-66, 507-08, 91 F. Supp. 917, 931-32 (1950).

sired to preserve its character as a forest wilderness for *public* benefit, drove a hard bargain. They insisted that—in return for Wisconsin passing the necessary laws to give the Menominee their own county and tax relief [14]—the Termination Plan developed by the Menominees provide that administration of the "sustained-yield" provision contained in the Termination Act be subject to complete Wisconsin State control. To assure pervasive State control Wisconsin also demanded that the Menominee forest be placed under a 30-year restriction against alienation—something that was without any statutory basis in the Termination Act itself. (T.J. 134-67A, Op. pp. 39-40).

Even though he had not yet been released from his fiduciary duties as the Menominees' trustee, and despite his recognition that the State's demands would impair the Menominees' property, the Secretary of the Interior refused to get involved in the negotiations with the State.[15]

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[14] T.J. 134-67A, Fdg. 62, pp. 138-39. The State laws, however, and particularly the tax law, were required as much by the State of Wisconsin, to protect its interests, as by the Menominees. *Id.*, Fdg. 64, p. 140, Op. pp. 43-44.

[15] The Secretary of the Interior on July 16, 1959, when the Menominees were still under federal supervision and protection, sent the following telegram to the Menominee Advisory Council:

> Reurtel July 9 concerning state legislative proposal for thirty year restrictive covenant on sale Menominee Forest property, *we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens.* In answer your specific query does Secretary have right to do this, we believe we can but would do so reluctantly only because you appeal that it is only way Menominees can get State legislation they want. Also it is in * * * accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale covenant in the deed provided Menominees give their consent, * * *." (emphasis added).

(T.J. 134-67A, Fdg. 70, p. 143).

He approved the plan and ultimately deeded the trust property of the Menominee Tribe to Menominee Enterprises, Inc., subject to the terms of the agreement which the Menominees who, as the Trial Judge found, "were in fact not prepared to manage their own affairs and to conduct their own negotiations." (T.J. 134-67A, p. 145) had been forced to make with the State. (*Id.*, Fdgs. 73-80, pp. 145-51). Their failure to stand up to the State's demands was to be expected in a people who had always been discouraged from making important decisions on their own, who found themselves " 'in the middle' and left largely to their own devices in dealing with federal and state governments, neither of which was prepared or disposed to treat with the problems of termination confronting the Menominees." (*Id.*, Fdgs. 70-72, pp. 143-44). (*See also id.*, Op. pp. 24-26). The State took unconscionable advantage amounting to duress while federal government officials turned their backs.

Pursuant to the State's demand, restrictions were placed in the deed "for the benefit of the State of Wisconsin" (*Id.*, Op. p. 19) that required operation of the forest on a *State regulated* "sustained-yield" basis (*id.*, Fdg. 168, pp. 190-91, Op. p. 41) and went on to preclude *any* sale of the land for 30 years without the consent of Wisconsin officials (*Id.*, Op. p. 20). Under this authority, lacking any trust obligations to the Menominees, the State of Wisconsin could require the operation of the Menominee forest as a park for the benefit of the State's citizens.

This action seriously reduced the value of what remained to the Menominees (T.J. 134-67A, Op. p. 87) so that as they ventured out into the white world, without federal protection and special federal status, they lacked essential property rights in their chief asset, their forest. They could not mortgage their property to raise funds for necessary capital improvements. They could not, without State permission, cut a sufficient volume of timber to

keep their forest healthy. To make matters worse, they were locked into a negligently prepared forest management plan, discussed below, which ensured minimal disturbance to the aesthetic values of the forest, the paramount interest of Wisconsin officials at the time, and prevented the Menominees from realizing the full potential that sustained-yield would allow.

2) *The decision below*

Suit was commenced in the United States Court of Claims in 1967 and the claims were tried in 1971. Eventually the claims were divided into separate dockets. In Docket No. 134-67A, "*Deed Restrictions*" the trial judge ruled that the actions, described above, were a breach of trust and that damages were due to the Menominee Tribe in the amount of $29,300,000 (*Id.*, Op. p. 111). On appeal the Court of Appeals reversed without reaching the merits of the trial judge's breach of trust determination, but entirely on the ground that the court had no jurisdiction to entertain the claim.

Relying on the Court of Claims decision in *Menominee Tribe v. United States*, 607 F.2d 1335 (known as *Menominee Basic*), the court below held that the claim was barred under the holding in *Menominee Basic* "that the United States could not be liable for any action of the Interior Department, in the implementation of the Termination Act, unless that action 'violated the Constitution or some outstanding directive of Congress." (607 F.2d at 1345). (App. A at 7a).[16]

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[16] The Court of Appeals also rejected the trial judge's alternative theory that the imposition of the Deed Restrictions "for the benefit of the State of Wisconsin" was constitutional taking of tribal property. The court reasoned that the restrictions imposed were essentially continuations of regulatory requirements which had existed prior to termination and that the tribe had not been deprived of its property rights by imposition of these restrictions. If certiorari is granted, we also reserve the right to argue that the

C. The Forest Mismanagement Claim

1) *The facts*

In the 1950's, the Secretary of the Interior, reacting to the judicial finding of mismanagement of the Menominee forest by *clear-cutting* in *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 91 F. Supp. 917 (1950),[17] went to the opposite extreme of *undercutting* the forest—a type of mismanagement perhaps even more injurious to the health of the forest. While ruinous clear-cutting was obvious to anyone,[18] "undercutting" was not perceivable in its occurrence or result to anyone other than a trained forester armed with detailed inventory and growth data.[19] It produced immense damage through the death of overmature timber and suppression of normal growth of new timber. (T.J. 134-67B, Fdgs. 36, 37, 99, Op. pp. 20-21).

While the amount of timber to be cut on the reservation was limited by Congress in the 1908 Act to 20 million board feet per year (20 MMBF), history had shown that this limitation was subject to adjustment and that Congress depended upon the officials of the Department of the Interior to advise it of the appropriate level of cut

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deed restrictions effected a Constitutional taking of an interest in the Menominee forest by vesting in the State of Wisconsin the authority to control cutting in the forest and forbid its alienation by the Menominees.

[17] In the period 1910-1928, government officials, acting squarely contrary to the congressional directive that the forest be managed on a "sustained-yield" basis, caused large portions of that forest to be clear-cut with resultant significant damage to the health of the forest.

[18] This is apparent from the description of the forest in *Menominee*, 117 Ct. Cl. 493-97, 91 F. Supp. at 924-26.

[19] In recognition of that fact, the Trial Judge limited damages to the period beginning after the government foresters had accumulated sufficient technical data to alert them to the "actual conditions (of) the forest." T.J. 134-67B, Op. p. 37. *See also id.*, Fdg. 40, p. 78.

or of other changes in management of the forest.[20] Indeed, on 3 different occasions, Congress had approved amendments to the 1908 Act changing the level of cut for various reasons.[21] On this record, as determined by the undisturbed findings of the Trial Judge, severe undercutting occurred during the period 1951-1961 when government managers of the Menominee forest, acting contrary to their own informed judgment, annually undercut, by a wide margin, the appropriate amount of stumpage which would have fostered healthy growth of the Menominee forest and ensured reasonable compensation to its Indian owners. The federal officials never took appropriate steps to obtain congressional change of what they knew was an inappropriate level of cut.[22]

The Bureau's passive and negligent management of the trust assets of the Menominees during the period between the consideration of the Termination Act in 1954 and its ultimate implementation in 1961, seemed to reflect a view that passage of the Termination Act in some way had weakened the continuing federal trust arising from the congressional directives contained in the 1908 Act. (App. F).

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[20] *See Menominee* 117 Ct. Cl. at 506-07, 91 F. Supp. at 931.

[21] T.J. 134-67B, Fdgs. 7-9, pp. 60-61; T.J. Op. pp. 30-31. In 1911 the limitation was temporarily expanded to 40 MMBF to permit the cutting of dead and down timber. Act of March 3, 1911, 36 Stat. 1076. In 1949, Congress allowed an additional 5 MMBF per annum to be cut over a 3-year period (Act of May 31, 1949, 63 Stat. 144); and in 1956 it amended the limitation to allow, on a permanent basis, 2 MMBF of timber other than sawlogs to be cut in addition to the 20 MMFB of sawlogs. Act of July 14, 1956, 70 Stat. 553.

Over the years, other amendments to the Act were adopted to remedy difficulties of administration not having to do with allowable cut. Act of May 18, 1916, 39 Stat. 123, 157; Act of March 2, 1917, 39 Stat. 969, 991-92; and Act of January 27, 1925, 43 Stat. 793.

[22] T.J. 134-67B, Fdgs. 23-33, pp. 69-74, 36-43; pp. 75-79.

In point of fact, during the period from the passage of the original Termination Act in 1954 until April 30, 1961, the effective date of termination of federal supervision, the government trusteeship of the Menominee Tribe and its assets was legally unchanged. However, in this period instead of winding up the trust with the great care required of a prudent trustee, the government agents treated the Tribe and its problems adversely at arm's length (T.J. 134-67A, Op. p. 21) and "began to withdraw the services it had traditionally provided prior to the passage of the Act." [23] As noted, it took no effective action to advise Congress of the need to increase the annual cut to levels necessary for the health of the forest. (*Id.* at 29-31). It refused to implement plans for construction of a veneer plant which all agreed would have significantly increased tribal income. (T.J. 134-67B, Fdgs. 58-65, pp. 86-88, Op. p. 25). Menominee Indians' prime veneer timber was allowed to be manufactured into ordinary lumber.[24] The government did not even make sure that the most valuable kinds of timber were cut in order to maximize tribal income.[25]

There was one area in which the Bureau of Indian Affairs did provide substantial, if misguided assistance. Under the provisions of Section 7 of the Termination Act, the Tribe was given the option and the right to obtain "reasonable assistance" from the Bureau of Indian Affairs in the preparation of integral elements of its Termination Plan. (App. D. at 27a-28a).

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[23] *Id.* at 25. Soon after the Termination Act was passed, the Bureau of Indian Affairs cut its Menominee Agency staff by over 50 percent, despite the local bureau officials' pleas for more government support to aid the Menominees in preparing for the difficult process of termination. T.J. 134-67A, Fdgs. 56-57, pp. 136-37.

[24] Cf. actual veneer output and realistic veneer output. T.J. 134-67B, Fdg. 76, pp. 96, 110.

[25] 34.3% of the total average cut, 1951-1960 was devoted to low-value hemlock at the expense of the more valuable timber. *Id.* at 92-93. *See also*, Fdgs. 50-53, pp. 84-85.

At that point, having, as the trial court found, no knowledge or suspicion of the serious mismanagement through the undercutting of their forest that had occurred in the decade of the 1950's (T.J. 134-67B, Op. p. 51) the Tribe requested that the very same government forester, Lee Winner, who was responsible for forest administration during that period, prepare a forest management plan that would govern the cutting of timber in the tribal forest *subsequent* to termination.[26] As found in detail by the trial judge, Mr. Winner's plan was so negligently prepared that its adoption made successful operation of the forest in the post-termination period a virtual impossibility, on either a commercial or silvicultural basis.[27]

2) *The decision below*

In Docket No. 134-67B (Forest Mismanagement) the trial judge, on April 4, 1980 awarded damages in the amount of $7,195,915 of which $4,317,500 was attributable to government mismanagement prior to termination in 1961 and $2,878,415 for the post-termination period. (T.J. 134-67B, Op. p. 54).

On appeal the Court of Appeals reversed, concluding that the entire claim for the pre-termination period (1952-1961) was barred by the statute of limitations in

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[26] T.J. 137-67B, Fdgs. 29-32, pp. 74-75. This plan was to be approved by the new state-chartered corporation, Menominee Enterprises, Inc., which would have control of the forestry enterprise.

[27] T.J. 134-67B, Fdgs. 90-92, pp. 124-31, Op. pp. 47-48. The plan provided for an increase of the annual cut from 22 to over 30 million board feet, but imposed such unsound restrictions as to where that cut could be made that they precluded attainment of the desired level. These could not be varied without the consent of State officials whose interests were contrary to those of the Menominee Tribe, and the inevitable result was continued substantial loss in the years after termination took effect (*Id.*, Fdgs. 90-92, pp. 124-31).

that suit, was filed in 1967 more than six years after the claim accrued. (App. B at 19a-20a). The court rejected the idea that the statute of limitations was "tolled" while the Menominees' property was held in trust by the United States or under the "blameless ignorance" doctrine, even though the Menominees did not know and could not themselves have determined the fact that the government was seriously damaging their forest by undercutting. The court held that the facts of the claim could have been discovered by the Menominees, *if* they had hired necessary experts to investigate them, and that this was enough to prevent a tolling of the statute.

With respect to the post-termination claim for the period after 1961 dealing with the government's negligent preparation of a forest management plan, the court, following its ruling in *Menominee Basic*, determined that the claim involved was beyond the jurisdiction of the court because the plan involved was an integral part of the "implementation" of the Termination Act and

> " 'as part of that [p]lan . . . the forest management plan cannot be assessed or evaluated by the Court of Claims or the Claims Court (or by us) and cannot be considered within current judicial jurisdiction to vindicate a claim for money damages against the United States for breach of trust.' " (App. B at 22a).

REASONS FOR GRANTING THE WRIT

1. The application of the statute of limitations by the court below conflicts with this Court's deicsion in *United States v. Mitchell*[28]

The decision of the Court of Appeals, in *Forest Mismanagement* on the application of the statute of limitations to Indian claims, raises an important question on the scope of the federal trust involved in the manage-

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[28] 463 U.S. ——, 103 S. Ct. 2961, 51 U.S.L.W. 4999 (1983) (hereinafter *Mitchell*).

ment of Indian timber. In *Mitchell* this court rejected the government's argument that the only redress available to the Indians for breach of fiduciary duty was an action for "declaratory, injunctive or mandamus relief" against the Secretary of the Interior. The decision below squarely conflicts with the resolution of that issue in *Mitchell* where this court held as follows:

> "To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A *trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.*" [29]

Compare the sharply conflicting language the Appeals Court used in rejecting the Menominees' claim that the statute of limitations was tolled because they were blamelessly ignorant of the government's mismanagement:

> "Plaintiffs charge Interior's officials with that very knowledge which was also available to the Indians *if they sought advice.*
>
> * * * *
>
> "Without doubt *the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim.* In short, '[t]he facts were all available,' and the running of limitations would not be tolled as if they were 'unknowable.' " [30]

In *Menominee Forest Mismanagement*, the federal trust involved was every bit as broad in scope as that

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[29] 103 S. Ct. 2973 (emphasis added).

[30] App. A at 17a-18a (emphasis added).

considered in *Mitchell*,[31] and the Indians were equally dependent on their trustee [32] for the management of their forest.

Yet the court below concluded that the Menominees' undercutting claim was not "inherently unknowable," and was, therefore, barred by the statute of limitations.

This ruling not only creates a duty to monitor the federal trustee's actions inconsistent with this court's ruling in *Mitchell*, but also ignores the trial court's determination that although the undercutting practiced by the government foresters in the Menominee forest was known by them to be injurious to the health and profitability of the forest and the foresters reported those facts to their superiors,[33] the facts were completely unknown to the Indians.[34] The Menominees had no reason to do anything but totally rely on the government foresters on whom they had always depended. As this court determined in *Mitchell*, they had no duty or reason to hire outside experts to monitor the government foresters' work.[35]

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[31] *See Menominee Tribe v. United States*, 117 Ct. Cl. 442, 917 F. Supp. 917-932 (1950).

[32] Act of March 28, 1908 (App. F); *see*, T.J. 134-67B, Op. p. 6; Statement *infra* at 8-9.

[33] T.J. 134-67B Fdgs. 20-33, pp. 68-75; Fdgs. 38-43, pp. 77-79.

[34] *Id.*, Op. pp. 50-51. Forester Winner testified that the 1952 inventory was but a "preliminary step" and that additional data was needed to complete the picture of the condition of the Menominee forest. This ultra-conservatism, which the trial judge found on the basis of the evidence to constitute mismanagement (particularly when the forester greatly delayed seeking the additional data), possibly explains the failure of the foresters to educate the Menominees in the problem. *Id.*, Fdgs. 24-31, pp. 73-75.

[35] There is no merit to the Court of Appeals' assertion (App. B at 18a) that the Menominees are chargeable with knowledge of their undercutting claim because (1) in 1956 they requested Congress, by resolution, to increase the allowable annual cut by 2

The Appeals Court's decision also flatly conflicts with *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), a well-reasoned and often-cited decision where, in a claim of government mismanagement of tribal funds, the statute of limitations was deemed tolled by reason of the trust relationship between the parties, until the wrong was revealed by an accounting, or the trust was terminated. Whether or not the rule of *Pomo* is correct (*i.e.*, that the statute of limitations is tolled by the existence of the trust relationship itself until the trust is ended), we submit that the combined effect in the instant case of the trust relationship and the Indians' lack of knowledge of the government's wrongful conduct present an *a fortiori* case.[36] A non-Indian might not be able to avoid the

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MMBF, and (2) that they had successfully brought an earlier suit against the United States based upon clear-cutting of parts of the forest, in violation of the sustained-yield requirement of the 1908 Act (*Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). (*See* the Court's description of the kind of ruinous clear-cutting practiced, 117 Ct. Cl. at 497-98).

First, the Indians' participation in requests addressed to Congress for an increase in the allowable cut of 2 MMBF (a figure far below that the Menominee foresters knew was required) shows only that when advised to do so by the government foresters, they lent tribal support to the foresters' suggestions to Congress.

Second, the Menominees' success in 1951 in obtaining a settlement against the United States for mismanagement of the forest is irrelevant. The fact that the Menominees at one time realized they had a claim resulting from the government's engaging in a particularly obvious and ruinous clear cutting (*see* App. B at 18a; T.J. 134-67B, Op. pp. 30-31) in no way establishes that they had the requisite skill and knowledge to enable them to know, then or at a much later time, whether the forest was being undercut (a much more sophisticated and invisible problem), or if so, whether the BIA was taking the necessary action to solve it.

[36] The Appeals Court accepted that a trust relationship did exist between the government and petitioners, App. B at 18a, but stated:

statute of limitations on the ground of "blameless ignorance" if the facts of the government's wrong were discoverable through the use of expert assistance or other means. However, the existence of the trust relationship, as this court held in *Mitchell*, means—if it means anything at all—that the Indians were entitled to rely on their trustee for their knowledge of the facts during the pendency of the trust, even during the period when the government was in the process of terminating that trust relationship but before termination became effective.[37]

Finally, the decision below presents an important question of general law affecting many plaintiffs in that it conflicts with the much-cited rule of *Urie v. Thompson*,

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" '[t]he statute of limitations applies to Indians the same as to anyone else' (except, perhaps, in the presence of an *express* trust which likewise does not exist here)." *Id.* at 19a.

The duties assumed by the government and the degree of control over the Menominee timber under the 1908 Act (App. F) were just as great or greater than those assumed over the Quinault allottees under the Act of June 25, 1910, conisdered in *Mitchell*. (*See* Statement, *supra* at 10). Accordingly, the government's pre-termination relationship with the Menominees and their forest is no different from one described in Section IIIA of this Court's opinion in *Mitchell*, 103 S. Ct. at 2969. The conclusion that "the language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship" and that "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds)," (*id.* at 2972) applies as well to the Menominees. Of course, the fact that the 1908 and 1910 Acts do not use the word "trust" is of no more significance to the finding of an express trust than the absence of that word in the 1910 Act considered in *Mitchell*. *See also Duncan v. United States*, 667 F.2d 36, 43 (1981), *cert. denied*, 51 U.S.L.W. 3938 (July 6, 1983).

[37] The Court of Claims itself recognized the validity of such a rule in the case of *Duncan v. United States*, *supra*, 667 F.2d at 44, where the Court held that the "trust" relationship between the United States and an Indian Rancheria which was to be terminated continued in full force until termination was in effect.

337 U.S. 163 (1949), (and its progeny) that a statute of limitations is tolled if a plaintiff can show "blameless ignorance" of the fact of his injury and its cause.[38] 337 U.S. at 169-170. This rule has been applied by the federal courts to claims brought under the Tucker Act as well as the Federal Torts Claims Act.[39]

Once the fact of injury and its cause are known, the statute begins to run and a plaintiff has the duty to inquire of professionals to see if he has been legally wronged and file his suit within the time period allowed. *United States v. Kubrik*, 444 U.S. 111, 122 (1979). But this duty applies only to a plaintiff armed with knowledge of his injury and its cause who is "no longer at the mercy of a defendant's specialized knowledge." *Stoleson v. United States*, 628 F.2d 1265, 1269-70 (7th Cir. 1980).

The decision below turns this doctrine on its head in ruling that the statute was not tolled because the Menominees *could* have discovered the "facts" of the injury to their forest *"if they sought advice."* (App. B at 18a). If this were the rule, then the plaintiff in *Urie* should have had his claim time-barred since expert advice might have informed him that years of exposure to

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[38] The insidious damage to the forest in the instant case is much like the situation in *Urie* in that the plaintiff there was exposed for many years to the cause of his affliction and suffered deterioration without realizing either that he had suffered an injury or the cause of that injury.

[39] *Watts v. United States*, 611 F.2d 550 (5th Cir. 1980); *Sanders v. United States*, 551 F.2d 458 (D.C. Cir. 1977); *Casias v. United States*, 532 F.2d 1339 (10th Cir. 1976); *Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975); *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974); *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973); *Tyminski v. United States*, 481 F.2d 257 (3rd Cir. 1973); *Toal v. United States*, 438 F.2d 222 (2nd Cir. 1971); *JAPWANCAP, Inc. v. United States*, 178 Ct. Cl. 630, 373 F.2d 356, *cert. denied*, 389 U.S. 971 (1967); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962).

silica dust was damaging to his health, even though the symptoms had not manifested themselves to him.

As developed above, the Menominees had no notice that their forest was being undercut and the insidious nature of the damage—an apparently healthy forest in which new growth was suppressed through undercutting—made it impossible for them to know the *fact* of their injury until many years after the damage occurred. In these circumstances, despite the Bureau of Indian Affairs' knowledge of the damage,[40] the Court of Appeals erred in reversing the trial judge's determination that the statute of limitations was tolled until some time after 1961 when the facts of injury were discovered by the Menominees.

2. The decisions of the court below raise significant questions about the jurisdiction of federal courts to hear Indian breach of trust claims where the breach involves actions implementing the provisions of a federal statute

In holding that the actions of the Secretary of the Interior were immune from judicial scrutiny—if they could be viewed as "implementation" of the Menominee Termination Act—the Court of Appeals has established a far-reaching and erroneous precedent of immense importance to every Indian tribe in the United States. By ruling that the courts have no jurisdiction to adjudicate breach of trust claims arising from actions performed under color of statutory authority, the court below would, in effect, vitiate the accountability of the United States to Indian tribes in the implementation of statutes imposing trust duties on the United States enacted for the benefit

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[40] Contrary to the position apparently taken by the court below, (App. B at 17a), "blameless ignorance" of a plaintiff is not negated by knowledge in someone else, particularly the defendant, that the plaintiff has suffered an injury at the hands of the defendant. *See, e.g., Spevak v. United States*, 300 F.2d 977 (Ct. Cl. 1968).

of the tribes.[41] *United States v. Mitchell*, 103 S. Ct. 2961 (1983).

All authority of the Secretary of the Interior and of the officials and agents of his Department comes from statutes. Departmental activity is in some sense always an implementation of some Act of Congress. If the activity in fact results in mismanagement of Indian assets and the Indians suffer damages, *Mitchell* tells us that the Indians have no recourse to the federal courts *unless* the action was undertaken pursuant to the Constitution or an Act of Congress or regulation of an executive department. If a wrong, to be justiciable, must arise in connection with the implementation of a statute it cannot at the same time be said—as the Court of Appeals did below—that if an act is performed in asserted implementation of a statute, it is not justiciable. The courts must do what the Appeals Court refused to do—look to the nature of the Act to determine whether it violated a duty assumed by the United States pursuant to statute or by some other means.

In *Menominee Tribe v. United States* (known as *Menominee Basic*), the Court of Claims determined that it lacked jurisdiction to hear claims based upon the assertion that Congress, itself, had violated the government's trust responsibility to the Menominee Tribe through passage of the Termination Act.[42] We do not challenge this ruling here.[43] However, when faced with application of the *Menominee Basic* rule and the principles laid down by

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[41] See statement of Congressman Jackson, 92 Cong. Rec. 5312-13 (1946) reporting Department of Interior approval of Section 24 of the Indian Claims Commission Act (28 U.S.C. § 1505) because it did not want to be in a position where it could mishandle Indian funds and property without being held accountable.

[42] 607 F.2d 1335, 1337-39 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980).

[43] The Petition for certiorari filed in that case was limited to consideration of the claimed *Congressional* breaches of trust.

this Court in *Mitchell* to the specific Menominee claims, the Court of Appeals below went far beyond the ruling in *Basic* and created a new kind of executive branch immunity that has no basis in logic or in law. The most flagrant violation of the principles of *Mitchell* is in the *Forest Mismanagement* case where the Court of Appeals ruled there was no jurisdiction in the Claims Court to consider the specific claim of whether the Secretary of the Interior provided "reasonable assistance" required and requested by the Tribe in the formulation of a forest management plan, or whether the assistance provided was so carelessly contrived that it ultimately did more harm than good.[44]

We submit that the Claims Court clearly had jurisdiction to consider this breach in the same way that the court would have jurisdiction if the Secretary had simply refused to give the Menominees *any* of the statutorily mandated assistance they requested. In giving the Menominees the right to request "reasonable assistance" from personnel of the Bureau of Indian Affairs, Congress expected the Indians to rely upon that assistance and expected the assistance to be rendered prudently and in the best interest of the Indians, consistent with Congress's

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[44] Under the provisions of Section 7 of the Termination Act, App. D at 27a-28a, petitioners had the right to receive "reasonable assistance" from the Secretary of the Interior in making preparation for termination. The Tribe, having been totally dependent upon BIA management of the forest throughout the history of its development, turned to BIA Forester Winner to prepare a post-termination Forest Management Plan. Preparation of this Plan required particular care for the newly terminated Tribe necessarily had to rely on its provisions as it learned to conduct its affairs without federal assistance. Moreover, the Plan could not be changed without the concurrence of Wisconsin officials. Despite these considerations, the Respondent's forester negligently prepared a plan which locked the Menominees into a destructive and inflexible cutting pattern, reducing the Tribe's allowable cut. This resulted in serious damage to the Menominee forest after termination. (*See*, T.J. 134-67B, Fdgs. 90-93, pp. 124-32).

directive. (*United States v. Mitchell*, 103 S. Ct. 2961, 2972 (1983)).

The Court of Appeals, after noting that the Forest Management Plan was an integral part of the Termination Plan authorized by the Menominee Termination Act, made the incredible decision that the claim must be dismissed because "matters connected with and authorized by the Termination Act are all beyond the jurisdiction of the Court of Claims and the Claims Court." (App. B at 21a).

Similarly erroneous was the sweeping immunity accorded by the court below in *Deed Restrictions* to actions of the Interior Department which led to the imposition of a "sustained-yield" requirement and a 30-year restraint on alienation[45] both administered by the State of Wisconsin. The decision below in *Deed Restrictions* goes so far as to hold that the courts could not examine the Secretary of the Interior's failure to aid the Menominees in their negotiations with the State, despite his knowledge that the State of Wisconsin was making demands which he characterized in a telegram as "unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens."[46] The Court of Appeals ruled that this course of conduct "fully accorded with the [Termination] Act" (App. A at 5a) and was therefore immune from judicial scrutiny. The court

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[45] Contrary to the Court of Appeals' decision the Menominee complaint is not that they were subject to a "sustained-yield" requirement which Congress had authorized in the Termination Act (App. A at 6a-10a), but rather that the requirement would be administered by the State of Wisconsin for the benefit of its citizens, and not for the benefit of the forest's Indian owners. The coupling of that with a 30-year restraint on alienation—not authorized by the Termination Act—made state control pervasive for the 30-year period and, contrary to the Court of Appeals undocumented conclusions, was neither "fully consonant with the Act" nor an "effort to enforce the statutory mandate of sustained yield management." (App. A at 7a).

[46] *See* note 15 *supra*.

did not even discuss petitioners' argument that the comprehensive trust established by the 1908 Act (App. F), which remained in effect until termination was proclaimed in 1961 (*See Statement, supra* at 5-6 and T.J. 134-67A, Fdg. 26 H, p. 120, Op. pp. 40-41), required the Secretary to assist the Menominees when he was put on notice of the overreaching demands of the State. The Secretary apparently knew (as indicated by his telegram quoted above n. 15) that these inequities would diminish the value of the trust corpus if embodied in the final termination plan. (*See* T.J. 134-67A, Op. p. 85).

History teaches that the trust relationship between American Indian tribes and the United States is in a constant state of flux. The 19th Century policy of integrating Indians into the general society, embodied in such actions as the General Allotment Act (25 U.S.C. § 331), was replaced by a recognition of a need to allow Indians to maintain their separate tribal existence on their own reservations as embodied in the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*). This, in turn, was replaced by the termination policy and various Termination Acts[47] of the 1940's and 1950's of which the Menominee Termination Act is a most notable example.

At present, the policy has shifted again in the direction of recognizing tribal sovereignty and allowing Indian people to maintain a separate existence. Under the Indian Self-Determination Act,[48] the Indian tribes are

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[47] For example, Wyandotte Termination of Act of August 1, 1956, 25 U.S.C. §§ 791-807; Peoria Termination Act of August 2, 1956, 25 U.S.C. §§ 821-826; Ottawa Tribe of Oklahoma Termination Act of August 3, 1956, 25 U.S.C. §§ 841-870. Ponca Tribe of Nebraska Termination Act of September 5, 1962, 25 U.S.C. §§ 971-980.

[48] 25 U.S.C. §§ 450 *et seq.* This Act allows the tribes, under contract with the Department of the Interior and/or the Department of Health and Human Services to administer for themselves Indian programs for which those two departments have responsibility.

encouraged to assume responsibility for programs heretofore administered on their respective reservations, by the Bureau of Indian Affairs and other governmental agencies.

If the decisions below are allowed to stand, officials of the United States will be free to violate their trust responsibilities to Indians as long as they are able to demonstrate that they are implementing some Congressional program for change in the trust relationship. In the context of the Indian Self-Determination Act, Interior Department officials would be free to disregard their trust responsibilities to Indians before a given program was effectively turned over to the Indians for administration. In the context of the Menominee Termination Act or other Termination Acts that may be enacted in the future, the Indians would lose the protection of the federal trust before that trust was effectively ended.[49]

We submit that Congressional intention to so abrogate Indian trust rights, like abrogation of treaty rights, should not be lightly imputed.[50] We submit that the Indians are entitled to the full protection of the federal trust as long as the duties of that trust continue. The integrity of the law requires that phase-out trust duties Congressionally mandated—such as the statutory provision to provide the Menominees "reasonable assistance" in termination planning—be enforceable in court to the same extent as the Congressionally mandated on-going trust duties considered by this Court in *Mitchell*.

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[49] *See* n.37, *supra*.

[50] *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 25, 1984
Washington, D.C.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 134-67A

THE MENOMINEE TRIBE OF INDIANS, *et al.*,
Appellees,

v.

THE UNITED STATES,
Appellant.

DECIDED: December 30, 1983

Before RICH, DAVIS, BENNETT, MILLER and SMITH, *Circuit Judges.*

DAVIS, *Circuit Judge.*

We revisit here the multi-faceted litigation brought in 1967, in the Court of Claims, by the Menominee Tribe of Indians (and some of its members and representatives), as a result of their dissatisfaction with the Menominee Termination Act of 1954, Pub. L. No. 399, ch. 303, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902 (1970). A sketch of the background of the suit is given in the unanimous *in banc* opinion of the Court of Claims in *Menominee Tribe of Indians* v. *United States*, 607 F.2d 1335, 1337-39 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980), which passed upon "the general issue of whether the United States is liable to appellees for breach of trust on account of the enactment and putting

into effect of the Termination Act", 607 F.2d at 1338.[1] Before us now is one aspect of the overall suit—the so-called "Deed Restrictions" claim, involving appellees' challenge to the restrictions on the future use and disposition of the Menominee lands which were established by the termination plan adopted and put into effect under the Termination Act.

Prior to the decision of the Court of Claims in *Menominee Basic* in October 1979, the trial judge of that court had rendered (in March 1979) a recommended decision and finding on this "deed restrictions" aspect of the general case. He ruled that appellees were entitled to receive $29,300,000, either for breach of trust or for a Fifth Amendment taking. After *Menominee Basic*, appellees moved the Court of Claims to remand this part of the case to the trial judge for reconsideration of his opinion, findings, and conclusion in light of *Menominee Basic*. The court did so in June 1980. Without calling for further briefing or argument by the parties, the trial judge filed (on January 2, 1981) the opinion, findings, and conclusion which are now before us. He again ruled for appellees, in the same amount and on the same alternative bases.[2] We reverse and order dismissal of these claims.

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[1] This decision is familiarly known as *Menominee Basic* because it dealt with the plaintiffs' basic claim, and was so denominated by the Court of Claims. *See* 607 F.2d at 1335. We shall refer to that opinion and decision by that shortened description.

[2] While the Court of Claims still existed, the Government filed a petition for review by the Article III bench of that court, which did not decide it. Pursuant to an October 4, 1982 order of this court, the Claims Court entered judgment on October 8, 1982, corresponding to the decision recommended in this case by the trial judge. The case was transferred on October 1, 1982, to this court under section 403 of the Federal Courts Improvement Act of 1982, 96 Stat. 57-8 (April 2, 1982).

I

The Deed Restrictions

The claims presented here by the Tribe concern two land restrictions included in the Menominees' termination plan (which is reproduced at 26 Fed. Reg. 3727). That plan provided that the deed conveying the reservation land under the Termination Act would contain the following:

> THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:
>
> 1. That the lands conveyed hereby shall be operated on a sustained yield basis until released therefrom under the laws of Wisconsin or by act of Congress.
>
> 2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

Plaintiffs contend, and the trial judge held, that these two restrictions—which we shall call the "sustained yield provision" and the "30-year restriction"—amounted either to a breach of fiduciary duty by the United States or to a Fifth Amendment taking without just compensation.

II

Menominee Basic

Menominee Basic is the matrix of much of our current decision; the court there said expressly that all the specific claims under this overall suit—including the two claims particularly involved here—"will, of course, have

to be decided within the limits of our [*i.e.*, the Court of Claims'] jurisdiction" as discussed in that opinion. 607 F.2d at 1345. It is necessary, therefore, to recall the rulings *Menominee Basic* made. First, the court broadly declared that the Court of Claims could not entertain any non-constitutional claims (including a claim for breach of fiduciary trust) that Congress itself violated any duty toward the Tribe by passing and enacting the Termination Act.[3] 607 F.2d at 1344-45. Second, the court held likewise—*i.e.*, that no vindicable claim existed—with respect to any non-constitutional claim that the Interior Department violated its fiduciary duty through its participation in the enactment and implementation of the Termination Act, unless it were shown that the Department breached a provision of that Act or of some other statute.[4] 607 F.2d at 1345-46. Third, the decision squarely held that further proceedings on the specific claims, such as those now before us, could be litigated

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[3] The opinion said:

> The jurisdictional barrier against our appraisal of Congress's action in enacting the Termination Act covers (a) any evaluation of Congressional motives or the interests Congress was pursuing; (b) any alleged failure of Congress to prepare the Menominees for termination, to make a full and fair disclosure to them of all pertinent facts, to allow further time before termination was effected, to give greater assistance to the Indians in the termination process, to reconsider the policy of termination, to adopt modified legislation, or to determine before final amendment of the Act whether the Tribe and its members were ready to assume management and control of their property and affairs; and (c) any alleged duress or pressure by Congress or its members on the Menominees to obtain their consent to termination.

[4] In that connection the court declared that Interior was required by the Termination Act to provide reasonable assistance in the formulation of the termination plan only to the extent requested by officials of the Tribe. The court also held that the Secretary of Interior could not disapprove the termination plan "if he thought the Menominees unprepared for termination, or that he could delay termination on that ground". 607 F.2d at 1346, n.24.

only "insofar as they do not rest on Congress' (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act". 607 F.2d at 1347.

Menominee Basic did not treat constitutional claims, and specifically left open all "claims said to arise under the Constitution". 607 F.2d at 1347.

III

Breach of Fiduciary Duty

In his discussion of breach of fiduciary duty, the trial judge wholly disregarded the instructions and holdings of *Menominee Basic*. Directly contrary to the explicit teachings of that decision (*see especially* fn. 3, *supra*,[5]), he extensively considered, and based his ruling on, the Congressional motives in passing and enacting the Termination Act, the alleged inadequate preparation of the Tribe for that termination, the alleged inadequacy of the measures to aid the Tribe to be ready for the termination, and the alleged pressures and decisions in the Tribe to accept termination. *Menominee Basic* pointed out that those were all beyond the court's jurisdiction and should not be taken into account. When these extraneous considerations are subtracted from the case (as they must be), and when the terms and objectives of the Termination Act are accepted at face value (as they must be), it is apparent that the two deed restrictions, far from being a vindicable breach of trust, fully accorded with the Act and gave rise to no justiciable claim for breach of trust.

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[5] With respect to the Interior Department, *Menominee Basic* also ruled beyond the Court of Claims' jurisdiction any liability "because the Interior Department did not itself undertake to try to stop Congress or to advise or persuade it differently or to do more than Congress required of it in order to prepare the Menominees for the termination Congress had ordered". 607 F.2d at 1345.

A. *Sustained Yield*

The amended Termination Act expressly provided: "The [termination] plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. * * * The sustained yield management requirement contained in [the Termination Act] * * * shall not be construed by any court to impose a financial liability on the United States". 25 U.S.C. § 896 (1964 ed.). Under *Menominee Basic* this sustained yield provision, which Congress specifically enacted in the Termination Act, could not be challenged in the Court of Claims as a breach of a fiduciary duty. The sustained yield provision demanded by the Termination Act was in fact included in the deed to the Menominees of the Reservation land, dated April 26, 1961, a deed issued pursuant to that Act. The Interior Department, together with the Tribe, simply implemented the explicit requirement of the Termination Act. For that, no liability for breach of fiduciary duty can possibly result—as *Menominee Basic* held.

Some argument is made that Interior improperly modified the statutory requirement by providing that the sustained yield mandate could be released either by the laws of Wisconsin or by Congressional act. Because appellees' claim is that the imposition of the sustained yield requirement reduced the value of the Menominee land, it is hard to see how they could be injured by inclusion of mechanisms for earlier release of that allegedly detrimental requirement.[6] In any event, those "release" provisions do not violate the purpose or terms of the Termination Act—do not take this case outside of the rulings of *Menominee Basic*. The statute specifically called upon

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[6] Nothing in the sustained yield provision of the deed *compelled* the Menominees to end the sustained yield program if Wisconsin or the Federal Government released them from the requirement. The choice remained with the Indians to continue the program if they wished to do so.

Interior to see that the termination plan "conforms to applicable Federal and State law". 25 U.S.C. § 896, *supra*. That requirement supports the reference, in the termination plan as well as in the deed, to both federal and Wisconsin law on release of the sustained yield requirement.

B. *30-Year Restriction*

Though not mandated by the Termination Act, the joint acceptance (in the plan and deed) of the 30-year restraint on alienation is likewise fully consonant with the Act, and therefore not chargeable as a breach of trust.[7] The 30-year restraint was an effort to enforce the statutory mandate of sustained yield management. The termination plan so characterized it.[8] Moreover, this restriction formed part of an arrangement under which the Tribe received a state tax advantage for maintaining the forest (or higher beneficial uses) for a long period. This could obviously be deemed important for the economic success of the post-termination Tribe, which was to be obtained (in part) by the sustained yield mandate.[9]

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[7] *Menominee Basic* held that the United States could not be liable for any action of the Interior Department, in the implementation of the Termination Act, unless that action "violated the Constitution or some outstanding directive of Congress." 607 F.2d at 1345.

[8] The plan said:

> To better insure the welfare of the Menominee people * * * deed convenants were agreed upon which will enforce the maintenance of the sustained yield principles in the care and preservation of the forest. It is believed that within thirty years sustained yield will have served the ultimate benefit of the Menominee people as a tribe, at the end of which time the owners can reassess their condition.

[9] Appellees argue that Wisconsin could exert extensive powers over the Menominee land as a result of the state's power to vary taxation of the land unless the Tribe agreed to the state's position on management of the forest and restrictions on alienation. Even if we assume the correctness of these assertions, they would not amount to a justiciable claim for breach of fiduciary duty by the

IV

Fifth Amendment Taking

The court below indisputedly had jurisdiction to pass upon appellees' claims that the deed restrictions amounted to a Fifth Amendment taking without just compensation. (*Menominee Basic* did not consider that aspect of the overall case or of this segment. *See* 607 F.2d at 1339-40.) We believe, however, that the trial judge erred in his alternative ruling that imposition of these provisions did constitute such takings. We hold, instead, that they were permissible regulations and that there is no proper claim for just compensation.[10]

A. *Sustained Yield*

Unlike some other Indian termination legislation, the Menominee Termination Act did not provide for, or contemplate, the general sale or transfer of the Menominee land to third parties; nor was the United States to assume ownership of the land. *Cf. Klamath and Modoc Tribes* v. *United States*, 436 F.2d 1008 (Ct. Cl.), *cert. denied*, 404 U.S. 950 (1971). The Menominee Tribe was expected to continue its own ownership. In that situa-

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Federal Government. First, insofar as Wisconsin was permitted to exert such power by virtue of the termination of federal control, that followed from the choice of Congress to enact the Termination Act—a matter *Menominee Basic* held outside of the jurisdiction of the Court of Claims. Second, potential misuse or improper use by Wisconsin of its authority after termination cannot be charged to the Federal Government. The deed restrictions themselves—the only matters with which this suit is concerned—do not contemplate any such state power. The reference in the deed to the two deed restrictions being "for the benefit of the State of Wisconsin", *supra*, merely gave that State the power to enforce the restrictions if they were violated.

[10] We by-pass, without reaching, appellant's argument that the Menominees fully consented and agreed to these restrictions and are therefore barred from urging them as a taking.

tion the sustained yield provision was simply the continuation of a regulatory requirement which had long existed for the Menominee forest and which Congress considered important for the future economic health of the Tribe. This regulation was imposed under the Congress' plenary authority to regulate Indian-owned forests. The Tribe never had unfettered ownership of the land; nor was that kind of ownership given to them in the Termination Act; accordingly, no property right was taken from the Indians when Congress required continued management on the sustained yield basis.

In *Menominee Tribe* v. *United States*, 117 Ct. Cl. 442, 499, 509 (1950), the Court of Claims held that the Act of March 28, 1908, 35 Stat. 51, required the Government to manage the Tribe's forest on what was, in effect, a sustained yield system. That requirement of the 1908 Act continued until termination in April 1961. Imposition of that requirement, one often used for Indian forests, was obviously within the Congressional authority over Indians. *See United States* v. *Mitchell*, U.S. Sup. Ct., No. 81-1748, decided June 27, 1983. In the course of assessing the original Termination Act, Congress amended it to include the same sustained yield directive after termination, for the very purpose of continuing the benefits of that policy to the Indians.[11] Because of its power over disposition of Indian property, Congress had the right so to condition its transfer of the land to the Tribe. *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 315-16 (1911). This refusal to grant unencumbered fee simple title to the Tribe was not the deprivation of any existing property right entailing Fifth Amendment compensation.[12]

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[11] It appears from the legislative history that the Menominee council approved and its counsel supported the amendment.

[12] Appellees mistakenly assume that Congress first granted full, unencumbered title to them and then imposed the sustained yield

The addition to the plan and the deed of provision for release of the sustained yield requirement by federal or Wisconsin law does not push the sustained yield directive into the compensatory category. As we have observed, *supra*, fn.6 and text at fn.6, those "release" provisions had no compulsory or injurious effect on the Menominees' use of the land; they did not take anything away from the Indians which the Tribe previously possessed. For the same reasons, those additions did not convey any of plaintiffs' property to Wisconsin simply because Wisconsin law could release or refuse to release the Menominees, if the Indians wished to accept that release, from the sustained yield mandate. Neither the Termination Act nor the termination plan gave broader authority to the state.[13]

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requirement. The true fact is that Congress restricted the transfer when it first made the transfer in the Termination Act.

That Congress did not, and did not intend to, grant unencumbered fee title to the Indians is shown, among other things, by the specific provision in the Termination Act (25 U.S.C. § 896 (1964 ed.)) that the sustained yield management requirement "shall not be construed by any court to impose a financial liability on the United States". Congress recognized by that proviso that it was not granting the Menominees the plenary title that would be a necessary prerequisite for a taking. The trial judge thought that this proviso was limited to claims of forest mismanagement following termination but nothing in the broad text or the legislative history indicates that the proviso's sole objective was directed at the post-termination period when the Federal Government would no longer have control over the forest.

[13] Appellees are wholly wrong in saying that the United States gave Menominee property to Wisconsin. We have already touched, in our discussion of the claim for breach of trust (see fn. 9, *supra*), on the Tribe's complaint that termination enabled Wisconsin, through its powers of taxation, to have great power over the Menominee land. Here, too, those assertions, if true, would not found a claim against the United States—this time for a constitutional taking. The United States would not take the Indians' property by terminating federal control of and supervision over the land, and forcing the Menominees to live on the same basis as

B. *30-Year Restriction*

The same principles demonstrate that the 30-year restriction falls short of being a Fifth Amendment taking. The United States could lawfully condition the transfer of the land to the Tribe on the latter's agreement not to alienate the land for a period of thirty years.[14] Restrictions on alienation are common with respect to Indian lands. *See, e.g., United States* v. *Mitchell*, 445 U.S. 535, 540-41 (1980); *Tiger* v. *Western Investment Co.*, 221 U.S. 186, 315-16 (1911). But even if we assume, contrary to our belief, that this restraint was invalid, that conclusion would not equate to the finding of a constitutional taking. The core principle is that there can be no such taking where, as here, no pre-existing property right is taken from the owner by the Government. Because there was no taking the plaintiffs could not obtain compensation under the Fifth Amendment for the allegedly unlawful imposition.

V

Mootness

Appellant insists that the case has become moot as a result of the Menominee Restoration Act of 1973, 25 U.S.C. §§ 903 *et seq.*, which returned the Menominee forest to federal trust status some 12 years after the termination of federal supervision and the imposition of the two deed restrictions. We reject the argument of mootness because, if appellees prevailed on any of their

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other United States citizens. Wisconsin might be liable for improper action *it* took, but not the Federal Government.

[14] In order to find a Fifth Amendment taking, we have to assume that Congress authorized the Interior Department to include the 30-year restriction in the transfer deed. If the Department's agreement to this restriction was *ultra vires*, there could not possibly be a Fifth Amendment taking which calls for initial authorization by Congress.

claims, they might prove to be entitled to some monetary recovery (even though materially less than the trial judge awarded). The case cannot as yet be called entirely moot.

VI

Conclusion

On these grounds, we hold that the court below was without jurisdiction of large portions of this case, and that (as to the claims within that court's jurisdiction) appellees have not shown any sustainable claim.[15] The decision below must be reversed with directions to dismiss the complaint in this Docket No. 134-67-A.[16]

REVERSED.

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[15] We hold, in particular, that appellees have not proved any violation by Interior of the Termination Act in the respects left open by *Menominee Basic*, or of any other federal statutes.

[16] In view of our holdings in this opinion, it is unnecessary to consider the detailed exceptions the appellant has made to the various findings of fact by the trial judge. Those findings all fall with our direction to dismiss the complaint.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 134-67B

THE MENOMINEE TRIBE OF INDIANS, *et al.*,
Appellants and Cross-Appellees,

v.

THE UNITED STATES,
Appellee and Cross-Appellant.

DECIDED: January 24, 1984

Before RICH, DAVIS, BENNETT, MILLER and SMITH, *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is another segment of the many-phased suit brought by the Menominees against the Federal Government in 1967, in the Court of Claims, to recover for a variety of alleged violations of their rights. Recently we issued our opinion in the so-called "Deed Restrictions" claim (*Menominee Tribe of Indians* v. *United States*, No. 134-67A, decided December 30, 1983). That opinion recalls the general background and nature of this massive litigation. Today we consider the separate "Forest Management" claim in which, after a trial, the trial judge awarded the plaintiffs $7,195,915 for defendant's alleged mismanagement of the Indians' forest resources.[1] Both

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[1] Of this amount, $4,317,500 was for defendant's mismanagement before April 29, 1961 (*i.e.*, prior to termination of federal control and supervision over the Menominees) and $2,878,415 was for damages (resulting from such past mismanagement) said to continue into the post-termination period (*i.e.*, after April 29, 1961).

sides appeal, the plaintiffs asserting that the award was insufficient and the Government arguing, on various grounds, that no award could or should have been made (or, if any award was owing, it should have been in a lesser sum).

The trial judge's opinion, findings of fact, and recommended conclusion were issued on April 4, 1980, while the Court of Claims still existed. Both sides filed exceptions and briefs which the Article III judges of the Court of Claims were unable to consider before that court expired on September 30, 1982. The case is now before us for decision.[2] We reverse and direct dismissal of the complaint.

II

Background

This particular case has some, but limited, connection with the Menominee Termination Act of 1954, as amended, 25 U.S.C. §§ 891-902 (1970),[3] which was the main focus of the Court of Claims' decision in *Menominee Tribe of Indians* v. *United States*, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980) (*"Menominee Basic"*) and of our decision in *Menominee Tribe of Indians* v. *United States*, No. 134-67A, decided December 30, 1983 (*"Menominee Deed Restrictions"*). The present claim is a charge of governmental mismanagement of the Menominee forest for the 10-year period beginning July

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[2] Pursuant to an October 4, 1982 order of this court, the Claims Court entered judgment on October 8, 1982, corresponding to the decision recommended in this case by the trial judge. The case had been transferred on October 1, 1982, to this court under section 403 of the Federal Courts Improvement Act of 1982, 96 Stat. 57-8 (April 2, 1982).

[3] Termination of federal control and supervision was effected under the Termination Act on April 30, 1961. The Menominee Restoration Act of 1973, 25 U.S.C. §§ 903 *et seq.*, returned the Menominee forest to federal trust status some 12 years after termination of federal control and supervision.

10, 1951, with an alleged impact on the forest lasting into the post-termination date of the trial below. Plaintiffs' claim for redress of alleged mismanagement begins with the date of the settlement (July 10, 1951) of prior Menominee litigation concerning the forest management (*Menominee Tribe of Indians* v. *United States*, 118 Ct. Cl. 290 (1951)). The present suit was begun on April 25, 1967.

The principal charge of mismanagement in the period 1951 to 1961 is that the Federal Government, as fiduciary manager of the Menominee forest, obtained too low harvest income because it adhered to an unreasonably low annual harvest limitation; this annual limitation had been first set by the Congress in 1890 and continued thereafter. The contention was that the Interior Department, though it knew or should have discovered that the limitation was deleteriously low in 1951-1961, failed to seek amendment of the statutory harvest limitation from the Congress, which could not be aware (it is said) of the changing conditions necessitating such an amendment unless so informed by government management personnel. The trial judge accepted this argument of breach of fiduciary duty.[4]

Defendant presents a number of reasons why the decision below should be completely reversed and the complaint dismissed.[5] We need consider only the defenses of limitations and of lack of jurisdiction to consider actions connected with the Termination Act.

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[4] The trial judge rejected plaintiffs' alternative claim of a Fifth Amendment taking by virtue of the alleged mismanagement; plaintiffs have not appealed that aspect of their over-all claim.

[5] These include: (a) lack of any subject matter jurisdiction in the Court of Claims or Claims Court over this entire claim of breach of fiduciary duty; (b) there was in fact no breach of fiduciary duty; (c) no jurisdiction over the claim for post-termination damages; and (d) bar by the six-year statute of limitations.

III

Statute of Limitations

Because this suit was commenced on April 25, 1967, the six-year statute of limitations applicable to the Court of Claims would ordinarily bar plaintiffs' claim to the extent it "first accrued" prior to April 25, 1961. 28 U.S.C. § 2501. Termination of federal control and supervision, under the Termination Act, was effective April 30, 1961. 25 U.S.C. § 896; 26 Fed. Reg. 3726. On April 26, 1961, the Secretary of the Interior, pursuant to 25 U.S.C. § 897, transferred the Menominee forest by deed to the plaintiffs (or their representatives). At most, therefore, there were only one to five days in which government action with respect to the management of the forest was within the six-year period for an allowable suit.

When did plaintiffs' claim of forest mismanagement "first accrue"? The trial judge measured plaintiffs' damages from January 1, 1952; he found that from the data available at that time defendant knew or should have known that the statutory harvest limitation "was the principal and controlling cause of substantial underproductivity in the Menominee Forest", and that it was a breach of trust for the Government to fail to supplement and refine the 1952 data "expeditiously". Accordingly, there is no doubt, under the unchallenged findings made below, that all of the claim of breach of trust resulting in pretermination damages actually related to assertedly improper government activities which began and continued prior to the allowable six-year period (*i.e.*, prior to April 25, 1961). The result is that, unless the running of the six-year statute was tolled during the pre-termination period, plaintiffs' claim is barred, at least as to all pre-termination damages.[6]

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[6] As indicated in Part I, *supra*, fn. 1, pre-termination damages account for almost two-thirds of the total recovery awarded below.

The trial judge held, and the Tribe contends, that the otherwise applicable six-year limitations period was tolled for two reasons: first, the Tribe was excusably ignorant of the facts underlying its claim until it began itself to manage the forest after termination in April 1961; and, second, limitations was tolled during the whole pre-termination period because of the then-existing trust relationship between the Tribe (including its forest) and the United States. We consider each argument in turn, accepting neither.

A. The contention of tolling because of "blameless ignorance" founders on improper factual findings together with incorrect legal rulings. It is settled, for one thing, that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights. *Affiliated Ute Citizens of the State of Utah* v. *United States*, 199 Ct. Cl. 1004 (1972); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971).[7] As to the facts,[8] there is here plainly no such *concealment* (*e.g.*, imposition of secrecy) by the defendant as would admittedly toll limitations. *See Spevack* v. *United States*, 390 F.2d 977, 981 (Ct. Cl. 1968); *Japanese War Notes Claimants Ass'n.* v. *United States*, 373 F.2d 356, 358-59 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). Nor were the facts of potential injury from Interior's conduct "inherently unknowable" at the ordinary accrual date in 1952. Plaintiffs charge Interior's officials with that very knowledge which was also avail-

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[7] There is double reason for applying that rule in this case. *Menominee Basic, supra*, 607 F.2d at 1346, pointed out that in the termination process (beginning prior to 1954) the Tribe was represented by "skilled attorneys".

[8] The trial court's factual findings on the problem of "blameless ignorance" were very summary and inordinately sketchy. The formal findings simply state what plaintiffs claimed without adopting that position. The opinion says no more than that "the Indians were not skilled in the technical science of forestry and no efforts were made by defendant to prepare them adequately to take over management of their property".

able to the Indians if they sought advice. The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. In 1956, acting on a resolution of the Menominee Council, Congress made one increase in the statutory harvest limitation (said by the Indians to be insufficient). The Tribe had successfully carried on the earlier suit (on another basis) against the United States for forest mismanagement and entered into a substantial settlement in 1951. *Menominee Tribe of Indians* v. *United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). At least from 1954 onward, the Indians and their attorneys participated actively in the Congressional consideration of termination and in the preparation of the termination plan. Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable". *See Affiliated Ute Citizens* v. *United States, supra*, 199 Ct. Cl. 1004 (1972).

B. We assume, without deciding, that there was a trust relationship between Interior and the Menominees with respect to the management of the latter's forest. *See United States* v. *Mitchell*, U.S. Sup. Ct. Oct. Term 1982, No. 81-1748, decided June 27, 1983; *Short* v. *United States*, 719 F.2d 1133, 1134-37 (Fed. Cir. 1983). Even so, limitations was not tolled, simply because of the existence of that trust relationship, until termination in April 1961.

The Court of Claims explicitly refused in comparable cases to toll the six-year limitation period of 28 U.S.C. § 2501 despite the fact that those Indian plaintiffs or the then-involved Indian property were under trust or in incompetent status. In *Capeoman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971), an "incompetent" Indian sued

"for recovery of certain charges made by the Government incident to the sale by it, as trustee, of the timber standing in plaintiff's trust allotment"; the disputed charges had been made in 1946 and suit was not brought until 1969 but the plaintiff argued that the six-year period was tolled by the rule (strongly argued in the present case) that limitations does not run against a beneficiary until the trust is terminated or repudiated. The court specifically ruled that that principle did not apply to Indians, like the Menominees here, who were suing on claims that the Government has never acknowledged on the merits. 440 F.2d at 1003. The opinion likewise rejected the related contention that 28 U.S.C. § 2501 does not bar a restricted Indian's claim against the United States for misappropriation of his trust funds. 440 F.2d at 1005-08. In the face of the unqualified terms of the limitations statute, and of the existence of other legislation modifying or waiving limitations for Indians, the court refused to read such an implied exception into the limitations provision of the Tucker Act (*i.e.*, 28 U.S.C. § 2501). *Capoeman* was followed in the summary order in *Caldwell* v. *United States*, 197 Ct. Cl. 1063 (1972). *Andrade* v. *United States*, 485 F.2d 660, 661, 664 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 831 (1974), applied the same principle that an Indian trust cannot toll the statute of limitations (in the absence of concealment or unknowable facts). Finally, *Fort Mojave Tribe of Indians v. United States*, 210 Ct. Cl. 727, 728 (1976), another trust case, invoked the same rule, saying that "[t]he statute of limitations applies to Indians the same as to anyone else" (except, perhaps, in the presence of an *express* trust, which likewise does not exist here). These rulings of the Court of Claims, binding on the trial judge and on us, clearly demonstrate that the trial judge erred in holding that the Tribe's claim for pre-termination damages was free of the bar of limitations (imposed by 28 U.S.C. § 2501) until the end of trust status in April 1961.

The sum of it is that the claim for pre-termination damages is entirely barred by limitations.

IV

1961 Management Plan

The trial judge held, and the Tribe maintains, that the "injuries to the Menominee Forest were perpetuated into the post-termination period by the 1961 Management Plan" [9] and that the Government is therefore liable for post-termination damages from April 29, 1961 through November 1, 1971 (a date shortly before the trial below). The 1961 Management Plan was drawn up in December 1960 but did not become fully effective until termination at the end of April 1961. As we have pointed out (Part III, *supra*), the six-year statute of limitations would not bar a claim arising in the last few days of April 1961. For that reason, it is said that the 1961 Management Plan, which became effective on April 30th, falls within the non-barred period. Defendant argues, on the other hand, that this portion of the plaintiffs' claim arose when the plan was earlier proposed, adopted, and made known in late 1960 and early 1961 (all within the barred period prior to formal termination). We bypass this dispute as to timeliness because we are satisfied that in any event the Court of Claims and the Claims Court had and have no jurisdiction over the Management Plan which was an integral part of the termination ordered by Congress in the Termination Act. This conclusion follows directly from the holding by the *in banc* Court of Claims in

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[9] This 1961 Management Plan is said by the Tribe to have "locked" the Menominees into a forest plan which seriously reduced the Indians' timber cut after termination and continued to call for unnecessary and improper undercutting of the forest. The plan was originally proposed by a government forester; the Tribe says that it had no participation in drawing up the final plan while the Government insists that the Indians fully participated. There is strong evidence supporting the Government's position.

Menominee Basic, *supra*, and also from the recent holding of this court in the *Menominee Deed Restrictions* case, *supra*, that matters connected with and authorized by the Termination Act are all beyond the jurisdiction of the Court of Claims and the Claims Court. We now spell out in more detail the reasons for that conclusion.

The Termination Act provided, in relevant part (Section 7), that the Tribe was to formulate and submit to the Secretary of the Interior "a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States including [specifying certain matters] and all other matters involved in the withdrawal of federal supervision". That the Menominee forest was directly involved in the termination plan was further shown by the following provision: "The termination plan shall contain provision for protection of the forest on a sustained yield basis * * *." 25 U.S.C. § 896 (1964 ed.). The trial judge expressly found that the 1961 Management Plan "was the initial concrete implementation of the sustained yield requirement" of the Termination Act and that the 1961 Management Plan was drawn up "in preparation for termination of federal supervision and protection".[10] Adverting in part to the 1961 Management Plan which was included in the termination plan, the final termination plan declared (26 Fed. Reg. 3727):

> The Plan formulated and submitted by the Tribe is designed to meet the requirements of law by * * * providing a sound economic base through regulation and use of communal tribal property and operation of the Menominee Forest on a sustained yield basis.

It follows that the preparation, content and impact of the 1961 Management Plan must be judicially treated as

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[10] The Tribe's reply brief states that the 1961 Plan was "prepared by defendant's forester pursuant to Section 7 of the Termination Act".

an integral part of the Termination Plan. As part of that Plan (and authorized by the Termination Act), the forest management plan cannot be assessed or evaluated by the Court of Claims or the Claims Court (or by us) and cannot be considered within current judicial jurisdiction to vindicate a claim for money damages against the United States for breach of trust. *Menominee Basic* precluded all court consideration of the impact of the Termination Act itself, or of Interior's actions taken pursuant to (and not in contravention of) that Act. 607 F.2d at 1344, 1344-47. *Menominee Deed Restrictions* reaffirmed that principle and specifically applied it to particular provisions of the termination plan which were contemplated and authorized by the Termination Act. Those rulings fully govern the current case and preclude the trial judge from doing what he did, *i.e.*, evaluating the drawing up and the effect of the 1961 Management Plan on the Menominee forest. The alleged deficiencies of the 1961 Management Plan fall into precisely the same class as the sustained yield and 30-year restriction requirements dealt with in *Menominee Deed Restrictions*, *supra*. Even though the portion of the Tribe's claim that rests on the 1961 Management Plan may possibly not be barred by limitations, that segment of the claim is nevertheless entirely outside the jurisdiction of the Court of Claims and the court below.

V

Conclusion

Thus, plaintiffs' entire "Forest Management" claim, now before us in this suit, is barred from consideration (for the reasons given in Parts III and IV, *supra*) and should have been dismissed. The complaint must now be dismissed, and the trial judge is so directed.[11]

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[11] The Tribe's cross-appeal on damages necessarily fails, and it is likewise unnecessary to consider the trial judge's findings of fact which must be vacated.

We are constrained to add that this is the third time that this trial judge has been reversed in these *Menominee* cases, reversals mainly compelled by the trial judge's direct disregard of controlling precedents binding on him. We expect that in the remaining segments of this general *Menominee* litigation the trial judge, if he continues with the *Menominee* cases, will not repeat that type of error. If he feels unable to conform to the controlling decisions, he should remove himself from the litigation.

REVERSED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 134-67(B)

THE MENOMINEE TRIBE OF INDIANS ETC., *et al.*,
Appellants,

v.

THE UNITED STATES,
Appellee.

ORDER

A petition for rehearing and a suggestion for rehearing en banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing en banc is declined.

FOR THE COURT:

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

February 16, 1984

cc: Jerry C. Straus
Glen R. Goodsell

APPENDIX D

MENOMINEE TRIBE OF WISCONSIN: TERMINATION OF FEDERAL SUPERVISION

§ 891. Purpose.

The purpose of sections 891 to 902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin. (June 17, 1954, ch. 303, § 1, 68 Stat. 250.)

§ 892. Definitions.

For the purposes of sections 891 to 902 of this title—

(a) "Tribe" means the Menominee Indian Tribe of Wisconsin;

(b) "Secretary" means the Secretary of the Interior. (June 17, 1954, ch. 303, § 2, 68 Stat. 250.)

§ 893. Membership roll; closures; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest.

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That applicants for enrollment in the tribe shall have three months from the date of the roll is closed in which to submit applications for enrollment: *Provided further*, That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further*, That any applicant whose application is not approved by the tribe within six months from June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application,

as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. (June 17, 1954, ch. 303, § 3, 68 Stat. 250.)

§ 894. Per capita payments to tribal members.

The Secretary is authorized and directed, as soon as practicable after June 17, 1954, to pay from such funds as are deposited to the credit of the tribe in the Treasury of the United States $1,500 to each member of the tribe on the rolls of the tribe on June 17, 1954. Any other person whose application for enrollment on the rolls of the tribe is subsequently approved, pursuant to the terms of section 893 of this title, shall, after enrollment, be paid a like sum of $1,500: *Provided*, That such payments shall be made first from any funds on deposit in the Treasury of the United States to the credit of the Menominee Indian Tribe drawing interest at the rate of 5 per centum, and thereafter from the Menominee judgment fund, symbol 14X7142. (June 17, 1954, ch. 303, § 5, 68 Stat. 251.)

§ 895. Management specialists; studies and reports; availability of funds; reimbursement of expenditures.

The tribe is authorized to select and retain the services of qualified management specialists, including tax consultants, for the purpose of studying industrial programs on

the Menominee Reservation and making such reports or recommendations, including appraisals of Menominee tribal property, as may be desired by the tribe, and to make other studies and reports as may be deemed necessary and desirable by the tribe in connection with the termination of Federal supervision as provided for hereinafter. Such reports shall be completed not later than February 1, 1959. Such specialists are to be retained under contracts entered into between them and authorized representatives of the tribe, subject to approval by the Secretary. Such amounts of Menominee tribal funds as may be required for this purpose shall be made available by the Secretary. In order to reimburse the tribe, in part, for expenditures of such tribal funds as the Secretary deems necessary for the purposes of carrying out the requirements of this section, there is authorized to be appropriated out of any money in the Treasury not otherwise appropriated, an amount equal to all of such expenditures incurred prior to July 2, 1958, plus one-half of such expenditures incurred thereafter, or the sum of $275,000, whichever is the lesser amount. (June 17, 1954, ch. 303, § 6, 68 Stat. 251; July 14, 1956, ch. 601, 70 Stat. 544; July 2, 1958, Pub. L. 85-488, § 1(a), 72 Stat. 290.)

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register.

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in

the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891 to 902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secretary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sec-

tions 891 to 902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. (July 17, 1954, ch. 303, § 7, 68 Stat. 251; July 14, 1956, ch. 604, § 1, 70 Stat. 549; July 2, 1958, Pub. L. 85-488, § 1(b), 72 Stat. 290; Sept. 8, 1960, Pub. L. 86-733, § 1, 74 Stat. 867.)

§ 897. Transfer of property.

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. The Secretary is directed to begin immediate negotiations with a private trustee of his choice to perfect a trust agreement so that if by March 1, 1961, the tribal corporation is not functioning, the Secretary will be prepared to transfer title to such property to said trustee as soon after March 1, 1961, as possible, but in no event later than April 30, 1961. The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits. (June 17, 1954, ch. 303, § 8, 68 Stat. 252; July 14, 1956, ch. 604, § 2, 70 Stat. 550; July 2, 1958, Pub. L. 85-488, § 1(c), 72 Stat. 291; Sept. 8, 1960, Pub. L. 86-733, § 2, 74 Stat. 867.)

§ 898. Taxes; initial exemption; taxes following distribution; valuation for income tax on gains or losses.

No distribution, conveyance, or transfer of title to assets and no issuance or distribution of securities pursuant to the plan approved by the Secretary under the provisions of sections 891 to 902 of this title shall be subject

to any Federal or State transfer, issuance, or income tax: *Provided*, That nothing contained in sections 891 to 902 of this title shall exempt the recipient of any cash distribution made hereunder from payment of income tax for the year in which the distribution is made on that portion of his share thereof which consists of interest on funds deposited in the Treasury of the United States pursuant to the Supplemental Appropriation Act, 1952 (65 Stat. 736, 754). Following any distribution, conveyance, transfer, or issuance as aforesaid, the assets and securities which are held by, and any income derived therefrom which is received by or payable to, any person, or any corporation or organization as provided in section 897 of this title, shall be subject to the same taxes, State and Federal, as in the case of non-Indians, except that the basis of any valuation for purposes of Federal income tax on gains or losses shall be the value of the property on the date title is transferred by the United States pursuant to section 897 of this title. (June 17, 1954, ch. 303, § 9, 68 Stat. 252; Sept. 8, 1960, Pub. L. 86-733, § 3, 74 Stat. 867.)

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected.

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891 to 902 of this title shall affect the

status of the members of the tribe as citizens of the United States. (June 17, 1954, ch. 303, § 10, 68 Stat. 252.)

§ 900. Protection of minors, persons non compos mentis and other members needing assistance; guardians; other adequate means.

Prior to the transfer pursuant to section 897 of this title, the Secretary shall protect the rights of members of the tribe who are less than eighteen years of age, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate. (June 17, 1954, ch. 303, § 11, 68 Stat. 252.)

§ 901. Rules and regulations.

The Secretary is authorized and directed to promulgate such rules and regulations as are necessary to effectuate the purposes of sections 891 to 902 of this title. (June 17, 1954, ch. 303, § 12, 68 Stat. 252.)

§ 902. Contracts for completion of vocational or undergraduate college program.

Notwithstanding any other provision of section 891 to 902 of this title, the Secretary of the Interior is authorized to contract with the Wisconsin Department of Public Instruction, prior to the date for terminating Federal responsibilities, for the completion of a vocational or undergraduate college program of any member of the Menominee tribe who has been accepted for such program prior to the termination date. (June 17, 1954, ch. 303, § 14, as added Sept. 8, 1960, Pub. L. 86-733, § 4, 74 Stat. 867.)

APPENDIX E

MENOMINEE TRIBE OF WISCONSIN: RESTORATION OF FEDERAL SUPERVISION [NEW]

§ 903. Definitions.

For the purposes of sections 903 to 903f of this title—

(1) The term "tribe" means the Menominee Indian Tribe of Wisconsin.

(2) The term "Secretary" means the Secretary of the Interior.

(3) The term "Menominee Restoration Committee" means that committee of nine Menominee Indians who shall be elected pursuant to subsections (a) and (b) of section 903b of this title. (Pub. L. 93-197, § 2, Dec. 22, 1973, 87 Stat. 770.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 903a, 903b, 903d to 903f of this title.

§ 903a. Federal recognition.

(a) Extension; laws applicable.

Notwithstanding the provisions of the Act of June 17, 1954, as amended, or any other law, Federal recognition is hereby extended to the Menominee Indian Tribe of Wisconsin and the provisions of the Act of June 18, 1934, as amended, are made applicable to it.

(b) Repeal of provisions terminating Federal supervision; reinstatement of tribal rights and privileges.

The Act of June 17, 1954, as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.

(c) Continuation of tribal rights and privileges.

Nothing contained in sections 903 to 903f of this title shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are now inconsistent with the provisions of sections 903 to 903f of this title.

(d) Continuation of property or contractual rights or obligations and tax obligations.

Except as specifically provided in sections 903 to 903f of this title, nothing contained in sections 903 to 903f of this title shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied.

(e) Grants for services entitled to upon Federal recognition; terms and conditions; power of Menominee Restoration Committee.

In providing to the tribe such services to which it may be entitled upon its recognition pursuant to subsection (a) of this section, the Secretary of the Interior and the Secretary of Health, Education, and Welfare, as appropriate, are authorized from funds appropriated pursuant to section 13 of this title, sections 2001 to 2004a of Title 42, or any other Act authorizing appropriations for the administration of Indian affairs, upon the request of the tribe and subject to such terms and conditions as may be mutually agreed to, to make grants and contract to make grants which will accomplish the general purposes for which the funds were appropriated. The Menominee Restoration Committee shall have full authority and capacity to be a party to receive such grants, to make such contracts, and to bind the tribal governing body as the successor in interest to the Menominee Restoration Committee: *Provided, however*, That the Menominee Restora-

tion Committee shall have no authority to bind the tribe for a period of more than six months after the date on which the tribal governing body takes office. (Pub. L. 93-197, § 3, Dec. 22, 1973, 87 Stat. 770.)

§ 903b. Menominee Restoration Committee.

(a) Nomination and election of members; time and procedure; ballot requirements; approval by Secretary; powers of Committee.

Within fifteen days after December 22, 1973, the Secretary shall announce the date of a general council meeting of the tribe to nominate candidates for election to the Menominee Restoration Committee. Such general council meeting shall be held within thirty days of December 22, 1973. Within forty-five days of the general council meeting provided for herein, the Secretary shall hold an election by secret ballot, absentee balloting to be permitted, to elect the membership of the Menominee Restoration Committee from among the nominees submitted to him from the general council meeting provided for herein. The ballots shall provide for write-in votes. The Secretary shall approve the Menominee Restoration Committee elected pursuant to this section if he is satisfied that the requirements of this section relating to the nominating and election process have been met. The Menominee Restoration Committee shall represent the Menominee people in the implementation of sections 903 to 903f of this title and shall have no powers other than those given to it in accordance with sections 903 to 903f of this title. The Menominee Restoration Committee shall have no power or authority under sections 903 to 903f of this title after the time which the duly-elected tribal governing body takes office: *Provided, however*, That this provision shall in no way invalidate or affect grants or contracts made pursuant to the provisions of section 903a(e) of this title.

(b) Eligible voters; notice by Secretary of nominating meeting and election.

In the absence of a completed tribal roll prepared pursuant to subsection (c) of this section and solely for the purposes of the general council meeting and the election provided for in subsection (a) of this section, all living persons on the final roll of the tribe published under section 893 of this title, and all descendants, who are at least eighteen years of age and who possess at least one-quarter degree of Menominee Indian blood, of persons on such roll shall be entitled to attend, participate, and vote at such general council meeting and such election. Verification of descendancy, age, and blood quantum shall be made upon oath before the Secretary or his authorized representative and his determination thereon shall be conclusive and final. The Secretary shall assure that adequate notice of such meeting and election shall be provided eligible voters.

(c) Membership roll; opening; revision procedure; prerequisites for inclusion; possession and maintenance of enrollment records and materials; appeal; finality of determination.

The membership roll of the tribe which was closed as of June 17, 1954, is hereby declared open. The Secretary, under contract with the Menominee Restoration Committee, shall proceed to make current the roll in accordance with the terms of sections 903 to 903f of this title. The names of all enrollees who are deceased as of December 22, 1973, shall be stricken. The names of any descendants of an enrollee shall be added to the roll provided such descendant possesses at least one-quarter degree Menominee Indian blood. Upon installation of elected constitutional officers of the tribe, the Secretary and the Menominee Restoration Committee shall deliver their records, files and any other material relating to enrollment matters to the tribal governing body. All further work in bringing and maintaining current the tribal roll shall be

performed in such manner as may be prescribed in accordance with the tribal government documents. Until responsibility for the tribal roll is assumed by the tribal governing body, appeals from the omission or inclusion of any name upon the tribal roll shall lie with the Secretary and his determination thereon shall be final. The Secretary shall make the final determination of each such appeal within ninety days after an appeal is initiated. (Pub. L. 93-197, § 4, Dec. 22, 1973, 87 Stat. 771.)

§ 903c. Tribal constitution and bylaws.

(a) Election; time and procedure.

Upon request from the Menominee Restoration Committee, the Secretary shall conduct an election by secret ballot, pursuant to the provisions of the Act of June 18, 1934, as amended, for the purpose of determining the tribe's constitution and bylaws. The election shall be held within sixty days after final certification of the tribal roll.

(b) Distribution by Menominee Restoration Committee prior to election of proposed constitution and bylaws and brief impartial description; consultations by Committee with persons entitled to vote.

The Menominee Restoration Committee shall distribute to all enrolled persons who are entitled to vote in the election, at least thirty days before the election, a copy of the constitution and bylaws as drafted by the Menominee Restoration Committee which will be presented at the election, along with a brief impartial description of the constitution and bylaws. The Menominee Restoration Committee shall freely consult with persons entitled to vote in the election concerning the text and description of the constitution and bylaws. Such consultation shall not be carried on within fifty feet of the polling places on the date of the election.

(c) Election of tribal officers provided for in constitution and bylaws; time and procedure for initial election; subsequent elections governed by constitution, bylaws and ordinances.

Within one hundred and twenty days after the tribe adopts a constitution and bylaws, the Menominee Restoration Committee shall conduct an election by secret ballot for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws. For the purpose of this initial election and notwithstanding any provision in the tribal constitution and bylaws to the contrary, absentee balloting shall be permitted and all tribal members who are eighteen years of age or over shall be entitled to vote in the election. All further elections of tribal officers shall be as provided in the tribal constitution and bylaws and ordinances adopted thereunder.

(d) Majority vote necessary for passage and initial election of tribal governing body; minimum number of voters required to vote.

In any election held pursuant to this section, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate the adoption of a tribal constitution and bylaws and the initial election of the tribe's governing body, so long as, in each such election, the total vote cast is at least 30 per centum of those entitled to vote.

(e) Revision of time periods pursuant to agreement of Secretary and Menominee Restoration Committee.

The time periods set forth in section 903b(c) of this title and subsections (a) and (c) of this section may be changed by the written agreement of the Secretary and the Menominee Restoration Committee. (Pub. L. 93-197, § 5, Dec. 22, 1973, 87 Stat. 772.)

§ 903d. Transfer of assets of Menominee Enterprises, Inc.

(a) Negotiation and development of plan for assumption of assets; submittal of plan to Congress.

The Secretary shall negotiate with the elected members of the Menominee Common Stock and Voting Trust and the Board of Directors of Menominee Enterprises, Incorporated, or their authorized representatives, to develop a plan for the assumption of the assets of the corporation. The Secretary shall submit such plan to the Congress within one year from December 22, 1973.

(b) Acceptance of assets by Secretary; prerequisites; preexisting rights and obligations in assets; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred.

If neither House of Congress shall have passed a resolution of disapproval of the plan within sixty days of the date the plan is submitted to Congress, the Secretary shall, subject to the terms and conditions of the plan negotiated pursuant to subsection (a) of this section, accept the assets (excluding any real property not located in or adjacent to the territory, constituting, on the effective date of sections 903 to 903f of this title, the county of Menominee, Wisconsin) of Menominee Enterprises, Incorporated, but only if transferred to him by the Board of Directors of Menominee Enterprises, Incorporated, subject to the approval of the shareholders as required by the laws of Wisconsin. Such assets shall be subject to all valid existing rights, including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, outstanding corporate indebtedness of all types, and any other obligation. The land and other assets transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the

State of Wisconsin. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and shall be their reservation. The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation.

(c) Transfer to Secretary of real property of Menominee Tribe members; necessity for transfer by Menominee owner or owners; preexisting rights and obligations in land; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred.

The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on December 22, 1973, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation.

(d) Consultation by Secretary and Menominee Restoration Committee with appropriate State and local government officials for non-impairment of necessary governmental services upon transfer of assets.

The Secretary and the Menominee Restoration Committee shall consult with appropriate State and local government officials to assure that the provision of necessary governmental services is not impaired as a result of the transfer of assets provided for in this section.

(e) Establishment of local government bodies, etc., by Wisconsin to provide necessary governmental services in Menominee County.

For the purpose of implementing subsection (d) of this section, the State of Wisconsin may establish such local government bodies, political subdivisions, and service arrangements as will best provide the State or local government services required by the people in the territory constituting, on December 22, 1973, the county of Menominee. (Pub. L. 93-197, § 6, Dec. 22, 1973, 87 Stat. 772.)

§ 903e. Rules and regulations.

The Secretary is hereby authorized to make such rules and regulations as are necessary to carry out the provisions of sections 903 to 903f of this title. (Pub. L. 93-197, § 7, Dec. 22, 1973, 87 Stat. 773.)

§ 903f. Authorization of appropriations.

There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 903 to 903f of this title. (Pub. L. 93-197, § 8, Dec. 22, 1973, 87 Stat. 773.)

APPENDIX F

CHAP. 111.—An act to authorize the cutting of timber, the manufacture and sale of lumber, and the preservation of the forests of the Menominee Indian Reservation in the State of Wisconsin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, under such rules and regulations as he may prescribe in executing the intent and purposes of this act, to cause to be cut and manufactured into lumber the dead and down timber, and such fully matured and ripened green timber as the Forestry Service shall designate, upon the Menominee Indian Reservation in the State of Wisconsin: *Provided*, That not more than twenty million feet of timber shall be cut in any one year: *And provided further*, That this limitation shall not include the dead and down timber on the north half of township numbered twenty-nine, range numbered thirteen east; the north half of township numbered twenty-nine, range numbered fourteen east, and the south half of township numbered thirty, range numbered thirteen east, on the Menominee Reservation in Wisconsin.

SEC. 2. That the Secretary of the Interior shall, as soon as practicable, cause to be built, equipped, and operated suitable sawmills, equipment and necessary buildings for manufacturing into lumber the timber cut under the provisions of this act, and there shall be employed such skilled foresters, superintendents, foremen, cruisers, rangers, guards, loggers, scalers, and such other labor, both in the woods and for operating sawmills, equipment and necessary buildings as may be necessary in cutting and manufacturing logs and lumber and in the protection of the forests upon said Indian reservation. The Secretary of the Interior in so far as practicable shall at all times employ none but Indians upon

said reservation in forest protection, logging, driving, sawing, and manufacturing into lumber for the market such timber, and no contract for logging, driving, sawing timber, or conducting any lumber operations upon said reservations shall hereafter be let, sublet, or assigned to white men, nor shall any timber upon any such reservations be disposed of except under the provisions of this act. Whenever any Indian or Indians shall enter into any contract pursuant to this act, and shall seek any agency, copartnership agreement, or otherwise to share in the same with any white man, or shall employ in its execution any labor or assistance other than the labor and assistance of Indians, such act or acts shall thereupon terminate such contract, and the same shall be annulled and canceled.

SEC. 3. That the lumber, lath, shingles, poles, posts, bolts, and pulp wood, and other marketable materials so manufactured from the timber cut upon such reservations shall be sold to the highest and best bidder for cash, after due advertisement inviting proposals and bids, under such rules and regulations as the Secretary of the Interior may prescribe. The net proceeds of the sale of such lumber and other material shall be deposited in the Treasury of the United States to the credit of the tribe entitled to the same. Such proceeds shall bear interest at the rate of four per centum per annum, and the interest shall be used for the benefit of such Indians in such manner as the Secretary of the Interior shall prescribe.

SEC. 4. That the Secretary of the Interior is hereby authorized to pay, out of the funds of the tribe of Indians located upon said reservation, the necessary expenses of the lumber operations herein provided for, including the erection of sawmills, equipment, and necessary buildings, logging camps, logging equipment, the building of roads, improvement of streams, and all other necessary expenses, including those for the protection, preservation, and harvest of the forest upon such reservation.

SEC. 5. That when the dead and down timber, and such fully matured and ripened green timber as the Forestry Service shall designate, shall have been converted into lumber, then the Secretary of the Interior is directed to make such sale of such portions of the sawmill and manufacturing plant as will not, in his judgment, be needed for continuing operations on this reservation. The terms of these sales shall be fixed by the Secretary, and after the payment of the costs and charges of sale the net proceeds thereof shall be deposited in the same manner and for the same purposes as the net proceeds of the sale of the lumber aforesaid.

SEC. 6. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, March 28, 1908.